

1992

American Equipment Co. Inc. v. Hales Sand & Gravel Inc. : Brief of Appellant

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 920339-CA**

IN THE UTAH COURT OF APPEALS

AMERICAN EQUIPMENT CO., INC. |

Plaintiff/Appellant, |

vs. |

HALES SAND & GRAVEL, INC., |

Defendant/Appellee. |

Case No. 920339-CA
Category 16

BRIEF OF APPELLANT

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW AND
JUDGMENT OF DISMISSAL OF THE SIXTH JUDICIAL DISTRICT COURT
SEVIER COUNTY, STATE OF UTAH
THE HONORABLE, DON V. TIBBS PRESIDING

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COURT OF APPEALS

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The plaintiff/appellant, American Equipment Co., Inc., submits the following Brief pursuant to Rule 24(a) of the Utah Rules of Appellate Procedure.

JURISDICTION

This Court has jurisdiction to decide this appeal pursuant of §78-2-2 Utah Code Ann. This case was transferred to the Court of Appeals pursuant to §78-2-2(4) Utah Code Ann. This is an appeal from Findings of Fact, Conclusions of Law and Judgment of Dismissal of the Sixth Judicial District Court in and for Sevier County, State of Utah, the Honorable Don V. Tibbs presiding. The Findings of Fact, Conclusions of Law and Judgment of Dismissal were entered by the Trial Court following a non-jury trial.

STATEMENT OF ISSUES

The following issues are presented to the Court for review:

1) Did the Trial Court err in finding that American Equipment Co., Inc. failed to present evidence that defendant, Hales Sand & Gravel, Inc., had not cleaned the air filter on a daily basis?

Standard of Review: The Findings of Fact should not be set aside unless clearly erroneous. Appellant must marshall all the evidence in support of the Findings and then demonstrate that the evidence, including all reasonable inferences drawn therefrom are insufficient to support the Findings. Rule 52(a), Utah Rules of Civil Procedure; Grayson Roper Limited Partnership v. Finlinson, 782 P.2d 467 (Utah 1989); Reed v. Reed, 806 P.2d 1182 (Utah 1991); Meese v. Brigham Young University, 639 P.2d 720 (Utah 1981).

2) Did the Trial Court err in finding that the installation of the air filter by defendant, the indentation on the air filter, and the failure, if any, of defendant to clean or inspect the air filter caused the damages to the engine of the AM316 Mini-Sweeper?

Standard of Review: The Findings of Fact should not be set aside unless clearly erroneous. Appellant must marshal all the evidence in support of the Findings and then demonstrate that the evidence, including all reasonable inferences drawn therefrom are insufficient to support the Findings. Rule 52(a), Utah Rules of Civil Procedure; Grayson Roper Limited Partnership v. Finlinson, 782 P.2d 467 (Utah 1989); Reed v. Reed, 806 P.2d 1182 (Utah 1991); Meese v. Brigham Young University, 639 P.2d 720 (Utah 1981).

3) Did the Trial Court err in its conclusion that Hales was not a buyer under the lease option agreement and therefore, not required to pay the reasonable attorney's fees incurred by American Equipment Company, Inc.?

Standard of Review: Legal conclusions are accorded no particular deference, but are merely reviewed for correctness. Grayson Roper Limited Partnership v. Finlinson, 782 P.2d 467 (Utah 1989); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884 (Utah 1988); Doelle v. Bradley, 784 P.2d 1186 (Utah 1989); Faulkner v. Farnsworth, 714 P.2d 1149 (Utah 1986); Arnold Machinery Co. v. Balls, 624 P.2d 678 (Utah 1981).

STATEMENT OF THE CASE

This matter involves an appeal from Findings of Fact, Conclusions of Law and Judgment of Dismissal entered on March 11, 1992 by the Sixth Judicial District Court in and,

for Sevier County, State of Utah, the Honorable Don V. Tibbs, District Court Judge. The Appellant, American Equipment Co., Inc., (American) a Nevada corporation doing business in Las Vegas, Nevada, brought this action against a lessee of its equipment, Hales Sand & Gravel, Inc., (Hales) a Utah corporation, claiming that Hales had failed to properly maintain equipment it had leased from American causing extensive damage to the engine. American sought damages against Hales for the cost to repair the equipment and for attorney's fees.

The matter was heard by the Court in a non-jury trial on February 18, 1992, before the Honorable Don V. Tibbs, District Court Judge. At the conclusion of the evidence, the Court ruled that American had failed to sustain its burden of proof and dismissed the Complaint of plaintiff with prejudice. The Trial Court entered its Findings of Fact, Conclusions of Law and Judgment of Dismissal on March 11, 1992. Appeal was filed by American on April 6, 1992. On May 26, 1992, pursuant to the power vested in the Supreme Court, this case was transferred to the Court of Appeals for disposition.

Statement Of Facts

On November 5, 1990, American and Hales entered into a lease with an option to purchase of an Athey AM316 Mini-Sweeper (Sweeper). A copy of the Lease, Exhibit 1, as admitted by the Trial Court is included in Appendix A. The Sweeper is a self-propelled commercial sweeper powered by a Volkswagen diesel engine. The Sweeper was operated and inspected by personnel for American prior to delivery to Hales. (Daryl Vance, Tr. 16; 10-20.) When delivered, the Sweeper was in good condition - no problems with power, no "blow-by",

no problems with the air filter or cover. (Tr. 17; 8-25; Tr. 18; 1-5.) Under the terms of the lease between American and Hales, Hales had the obligation to maintain the equipment in good condition and perform regularly scheduled maintenance of the equipment while in its possession. (Lease, Ex. 1) At the time of the delivery of the machine to Hales, the Operator's Manual was included in the cab of the machine. (Daryl Vance, Tr. 19; 2-11.) The maintenance and servicing schedules contained in the manual require daily cleaning of the air filter. (Maintenance Schedule of Operator's Manual, Exhibit 5, p. 20 & 27 attached as Appendix B).

During the use of the machine, Hales developed several problems with the starter and alternator. A mechanic, Mr. Gail Shoemaker, was dispatched on November, 5, 1990 by American to check the machine and perform any necessary repairs. When Mr. Shoemaker inspected the machine at the home of John Hales, he discovered the air cleaner was excessively dirty and dust had entered the engine through the air intake. (Gail Shoemaker, Tr. 63; 6-23.) Mr. Shoemaker determined that the starter failed because of overcranking due to low compression of the engine. The low compression was a result of the excessive dust that had been allowed by Hales to enter the engine. (Tr. 65; 4-10.) Dust in the engine had damaged the engine and had caused a condition known as "blow-by"¹.

¹ "Blow-by" is caused by extreme wear on the rings and cylinder walls of the pistons so that exhaust gases from the cylinder go past the rings of the piston and down into the crank case of the engine picking up oil. The exhaust gases then pick up oil residue and deposit it in the crank case ventilation, which in this case is the air cleaner housing. (Daryl Vance, Tr. 17; 16-23; Tr. 31; 14-25; Tr. 32; 1-4; Billy Hale, Tr. 54; 1-16.)

On or about November 20, 1990, Hales returned the Sweeper to American. When that machine was inspected by American upon return, it was discovered that the air cleaner was extremely dirty and clogged and the engine had excessive "blow-by". (Tr. 22; 1-14.) American took the Sweeper to Gaudin Motors, the Volkswagen dealer in Las Vegas, Nevada. (Billy Hale, Tr. 39; 11-14.) When the Volkswagen dealer dismantled the engine, dust and dirt were found throughout the engine. (Tr. 59; 4-13.) The cost to repair the damages to the engine, as a result of the dust and dirt entering through the air intake totaled \$5,553.35. (Tr. 51; 2-7.)

On December 6, 1990, American notified Hales by letter of the damages done to the Sweeper and made its demand on Hales for payment of \$5,553.35 for the cost of the repairs to the machine. (Ex. 2 attached in Appendix C.) Hales failed to pay the cost of repairs to American and American filed this action seeking compensation for the damages to the Sweeper and attorney's fees pursuant to the lease agreement.

SUMMARY OF ARGUMENT

The primary issues before the Trial Court were:

1) Whether Hales had breached its obligations under the lease agreement to perform regular maintenance on the Sweeper; and 2) if Hales' failure to maintain the Sweeper caused the damages to the Sweeper engine. The evidence was undisputed that the lease and operation manual required daily cleaning of the air filter. Newell Hales, one of the principals in Hales, admitted that Hales had not cleaned the air filter on a daily basis. Defendant did not dispute that the Sweeper was in good condition when it was delivered to Hales and there were

no problems with "blow-by" in the engine. Gail Shoemaker, who performed a repair on the Sweeper when it was in the possession of Hales in November, 1992, discovered that the air cleaner was excessively dirty and Hales had allowed dust to enter the engine through the air intake. When the Sweeper was returned to American by Hales the engine had excessive "blow-by" and oil in the air filter. The engine was dismantled and dirt and dust were discovered throughout the engine.

Hales offered no evidence in support of its claims that the Sweeper was defectively designed to allow dust to damage the engine or that the Sweeper was damaged prior to Hales' use. The Trial Court's Findings of Facts that American failed to establish by a preponderance of the evidence that the installation of the air filter by Hales, the indentation on the air filter, or any failure of Hales to clean or inspect the air filter had caused the damage to the engine was clearly erroneous and against the clear weight of the evidence. The undisputed cost to repair the engine was \$5,553.35.

The Trial Court erroneously ruled that Hales was not required to pay American a reasonable attorney's fees incurred in this matter. The lease entered into between the parties provided that "buyer" was responsible to pay the attorney's fees if it failed to pay any amounts invoiced under the agreement. The designation "buyer" was merely used for identification of the parties in the agreement. The agreement did not require that Hales exercise its option to purchase as a condition precedent to the application of the attorney's fees provision of the agreement. American is entitled to its attorney's fees incurred in pursuing this action. The

Court should reverse the Trial Court's Judgment of Dismissal and find in favor of American that Hales caused the damages to the engine of the Sweeper and award American its cost of repairs together with attorney's fees.

ARGUMENT

POINT I

The Evidence Did Not Support The Court's Finding
That The Damage To The Engine Was Not A Result
Of Defendant's Failure To Properly Maintain The Sweeper.

The central issues to be decided by the Trial Court in this matter were: 1) Whether Hales had breached its obligations under the lease to properly maintain the Sweeper and 2) if Hales had failed to properly maintain the Sweeper, did that failure cause the damages to the Sweeper's engine. The Trial Court ruled in Finding No. 28: "The Operations Manual introduced as Exhibit ___ cited that the air cleaner was to be checked on a daily basis and to be replaced as needed. The plaintiff had no evidence that Hales did not do this." In Finding No. 29: "There is not a preponderance of credible evidence that the installation by defendant or the indentation on the air filter, or that any failure of Hales to clean or inspect the air filter has caused the damage to the engine."

The clear weight of the evidence presented at trial was that not only did the agreement require that the air filter be checked on a daily basis but that it needed to be cleaned on a daily basis. The evidence was undisputed that Hales failed to clean the air filter on a daily

basis. The evidence clearly showed that the damage to the engine was caused by the improper maintenance and installation of the air filter by Hales during its use of the Sweeper.

Upon review of the Trial Court's entry of Findings and Fact, the Court of Appeals must view the evidence in the light most favorable to the Court below and may only overturn the Findings of Fact if it finds that they are clearly erroneous. The defendant must marshal all of the evidence in favor of the Findings and then demonstrate that the evidence was insufficient to support the Findings. Reed v. Reed, 806 P.2d 1182 (Utah 1991), Grayson Roper Ltd. v. Finlinson, 782 P.2d 467 (Utah, 1989); Rule 52(a) URCP. American recognizes that it is a substantial burden to overcome the Findings of Fact entered by the Trial Court in this matter. This case does not present the Appellate Court with the task of comparing conflicting evidence and then trying to decide what a reasonable person should have concluded. Rather, Hales failed to present any evidence disputing or contradicting the essential issues in this case.

**A. The Lease And Operation Manual Require
Daily Cleaning Of The Air Filter.**

Hales and American entered into a lease with an option to purchase the Sweeper on September 5, 1990. (Ex. 1) The lease provides:

5. Equipment must be maintained in good condition and regularly scheduled maintenance performed while in your possession.

(See Appendix A.)

The Operator's Manual for the Sweeper was included in the cab of the machine when it was delivered to Hales.

Q: Was the manual included with delivery of the machine?

A: Yes.

Q: And did you also have an opportunity to review the machine when it was delivered back to American Equipment?

A: Yes. I did.

Q: And was the operating manual with it in the --

A: It was in the cab.

Q: --in the cab?

A: Yes, sir.

(Daryl Vance, Tr. 19; 2-11.)

The operating manual specifically provided that the air cleaner must be cleaned daily. (Ex. 5, p. 20 & 27) The evidence was undisputed that the regularly scheduled maintenance for the air cleaning system required daily cleaning. Billy Hales, the service manager for American, testified that the air filters should be cleaned daily.

Q: How frequently should you change the air filters?

A: Air filters?

Q: Yeah.

A: Well, it would depend on the sweeping condition. Most of them, like on this case, it should be cleaned daily. Replacement of them, I would say,

that would depend on how often you clean them, the damage that was done to them and this kind of stuff.

Q If it had an edge that didn't fit right, would that indicate to you that it should be replaced?

A Yes, sir.

(Tr. 93; 23-25; Tr. 94; 1-8.)

**B. Hales Admitted It Did Not Clean The
Air Filter Daily.**

Newell Hales, one of the principals in Hales Sand & Gravel who testified on behalf of defendant at the trial, admitted that the air filter was not cleaned on a daily basis Mr Hales testified that they operated the Sweeper approximately 40 days during the eight weeks Hales had it in its possession. (Newell Hales, Tr. 121; 10-25; Tr 122, 1-3) Hales replaced the air filter about two or three times (Tr 121, 3-5, Tr 110, 16-20) Hales cleaned each air filter approximately two or three times before they were replaced (Tr 122, 4-10, Tr 110, 6-9) Mr. Hales also testified that they did not clean the air filter on a daily basis

Q: So wouldn't it be fair to say that you did not clean the air filter every day that it was operated?

A: We did not, no. Not every day But we don't clean our own brooms every day.

(Tr. 122, 11-14.)

The evidence at trial was uncontroverted that defendant failed to fulfill its duties under the lease agreement and Operator's Manual to perform the maintenance required on the

Sweeper. Findings of Fact No. 28 that "the plaintiff had no evidence that Hales did not do this" (clean the air filter daily) is contrary to the undisputed testimony of Newell Hales. The only issue was whether the Sweeper was damaged as a result of Hales failure to properly maintain the air cleaning system.

C. The Damage To The Engine Was Caused By Hales' Failure To Properly Maintain The Sweeper.

Defendant did not dispute that the damage to the engine of the Sweeper resulted from dust and dirt entering through the air intake system. Counsel for defendant in his closing argument stated:

Your Honor, I think that Mr. Jeffs is correct when he says that there is no dispute on some things and that the problem is that dust damaged this engine.

(Tr. 145; 7-9.)

Daryl Vance, who operated and inspected the Sweeper prior to delivery to Hales, testified that when he operated the Sweeper just prior to delivery it was in good condition.

Q: Do you recall that examination that you did?

A: Yep.

Q: How was it performed?

A: The machine itself?

Q: Yes.

A: It was in satisfactory condition.

Q: Well, how did you perform the examination?

A: Oh, by operational checks on it, and visual.

Q: Okay. You actually operate the machine and make sure it's functioning properly?

A: Yes, I had.

Q: What was the condition of the machine at that point in time?

A: Good.

Q: Was there any problem with the tire, (sic. power) on the machine?

A: No.

Q: Was there any blow-by?

A: No. . .

Q: Okay. What was the condition of the air cleaning system?

A: Good.

Q: Was there any problem with the air filter?

A: No.

Q: How about the cover for the air cleaner?

A: No. There was no problem.

(Daryl Vance, Tr. 16; 21-25; Tr. 17; 1-15, 24-25; Tr. 18; 1-5.)

Gail Shoemaker went to perform a repair on the Sweeper on November 5, 1992. He discovered that the air cleaner was excessively dirty and that Hales had allowed dust to enter the engine through the air intake.

A: The engine smoked, was very hard to start. I shut the engine down and I pulled the air clean apart because it was smoking. And it was starving for air and I inspected the machine air system from the top of the cab clear down to -- thought maybe it was plugged up, starving this engine for air. And when I took this cover off the air cleaner, there was an excessive amount of dust in there. And when I looked at the air cleaner out of it, down inside you could see where the dust had went through or around this air cleaner element.

Q: Did it appear to you that the air cleaner had been recently cleaned?

A: Well, if it had, it hadn't been done often enough. At that time the air cleaner was very, very dirty.

(Gail Shoemaker, Tr. 63; 8-21.)

On return of the Sweeper to American by Hales, the Sweeper was checked in by Daryl Vance. When Daryl Vance checked in the equipment, he filled in the Receiving Memo, Ex. 6 (a copy of which is attached hereto as Appendix D), that listed the damages to the Sweeper including that the engine missed at high idle, smokes at low power, air filter was very dirty, oil was in the air filter housing from "blow-by". Daryl Vance testified about the condition of the Sweeper when he received it:

Q: Do you recall your inspection that you performed at that time?

A: Yes. I do.

Q: What was the condition of the air filter when you inspected it at that time?

A: The air filter was extremely dirty. It was -- appeared to be clogged.

Q: Okay. And what was the condition of the cover around the air filter?

A: The cover was in place, but the housing holding the filter was full of oil.

Q: And what would cause the housing of that filter to be full of oil?

A: Extreme "blow-by"² from the engine.

(Daryl Vance, Tr. 22; 1-14.)

The Sweeper was returned to American with obvious engine damage. American then took the Sweeper to the Volkswagen dealer in Las Vegas, Nevada, Gaudin Motors. Gaudin dismantled the engine and it was determined that the cause of the damage was dirt getting into the engine through the air intake.

Q: You said that you had a chance to inspect the engine when it was dismantled over at the Volkswagen dealer; is that right?

A: Yes.

Q: And what did you see about the engine?

A: It showed that it had had a lot of dust and dirt gone through the engine.

Q: Inside of the engine?

² "Blow-by" is caused by extreme wear on the rings and cylinder walls of the pistons so that exhaust gases from the cylinder go past the rings of the piston and down into the crank case of the engine picking up oil. The exhaust gases then pick up oil residue and deposit it in the crank case ventilation, which in this case is the air cleaner housing. (Daryl Vance, Tr. 17; 16-23; Tr. 31; 14-25; Tr. 32; 1-4; Billy Hale, Tr. 54; 1-16.)

A: Yes. um-hm.

Q: Where?

A: Some of the main places was like the pistons and the rings, the walls of the block. And also, dirt had gotten into the oil compartment. There was quite a bit of it still in there.

(Billy Hale, Tr. 58; Line 25; Tr. 59; 1-13.)

The air filter on the Sweeper at the time it was inspected by Gail Shoemaker when he discovered dirt in the air intake, had been installed by Hales:

Q: And the filter that was in place November 10, when Gail Shoemaker came and repaired the machine, that would have been one that you purchased; Is that right?

A: Um-hm.

Q: And your people would have installed?

A: Yes.

Q: So if it was installed improperly at the time, it would have been your people that installed it improperly?

A: If it was installed improperly, yes.

(Newell Hales, Tr. 122; 18-25; Tr. 123; Line 1.)

In addition, the filter that was installed in the Sweeper at the time the Sweeper was returned by Hales to American had been purchased and installed by Hales.

Q: And the filter that was on it at the time it was returned to American Equipment would have been a filter that you purchased: is that right?

A: Yeah, because every time a filter is beyond its usefulness, we just throw it away.

Q: And it would also have been installed by your personnel?

A: Yeah.

(Newell Hales, Tr. 123; 2-9.)

In addition to failing to clean the air cleaner daily, Hales also improperly installed the air cleaning element. The air cleaning element was introduced at trial as Exhibit 18. The air cleaner which had been installed by Hales and was on the Sweeper when it was returned to American, had an indentation on the underside of the air filter showing that it had been improperly installed allowing dust to enter underneath the edge of the air cleaner. Billy Hale, service manager for American, testified in detail as to how the indentation and improper installation had allowed dirt to be sucked into the engine underneath the edge of the air cleaner. (Billy Hale, Tr. 97; 18-25; Tr. 98; 1-25; Tr. 99; 1-25.) At the time Mr. Shoemaker performed his repair on November 5, 1990, Mr. Shoemaker told John Hales, one of the principals of Hales Sand & Gravel, that it was his opinion that the engine had been "dusted". (Gail Shoemaker, Tr. 57; 14-25.)

Gail Shoemaker, the expert diesel mechanic called to testify by American in this matter, testified that he had experience with dust and dirt getting into an engine. Mr. Shoemaker related an incident when during his training as a mechanic, an instructor dumped a small container of dust and dirt into the air intake of an engine they were working on. He:

testified it took less than five minutes before the engine developed "blow-by" and the engine was ruined. (Gail Shoemaker, Tr. 66; 11-25; Tr. 66; 1-13.) In Mr. Shoemaker's opinion, the engine of the Sweeper was ruined very quickly after dust and dirt were allowed to enter the air intake. (Gail Shoemaker, Tr. 66; 14-23.)

As shown by the Receiving Memo (Ex. 6), on return of the equipment to American by Hales, the Sweeper had 383 total hours. The average life of an engine in heavy equipment like this is approximately 1500 hours prior to any overhaul being needed. (Daryl Vance, Tr. 21; 7-22.) This Sweeper required an overhaul of its engine after only 383 working hours. Reasonable minds could only conclude that damage to the engine of this Sweeper was caused by the improper maintenance by Hales of the air cleaning system.

**1. Hales Failed To Present Any Evidence
In Support Of Its Defenses.**

Hales claimed the Sweeper was defectively designed so that dust would be introduced into the engine compartment and that defective design caused the damage to the engine. Hales also claimed that the engine had been damaged prior to Hales' use of the Sweeper. In defendant's closing argument he stated:

Our position is that Hales is not responsible for that piece of equipment not being fit for use as a sweeper, for it having a design that sucked dirt into it, and not responsible for any damage that may have been caused before.

(Closing Argument of David Nuffer, Tr. 147; 11-14.)

Hales offered no evidence that there was any damage to the engine prior to Hales use of the Sweeper. The only testimony having any possible relevance to Hales' claim that there was prior damage to the engine of the Sweeper was from Newell Hales, one of the principals of Hales Sand & Gravel, when he testified:

Q: Did the machine operate okay after you got the starter replaced?

A: It seemed to. It never did have what I would consider a lot of power. But you know, I just thought maybe it was just that machine. I'm used to equipment that's got a lot of power, and this didn't.

Q: From the first time that you operated the machine, it didn't have much power?

A: Not what I call a lot of power. Maybe it was sufficient for that machine. I don't know.

(Newell Hales, Tr. 112; 13-22.)

By defendant's own characterization, he did not know how much power the machine should have. No testimony was presented to controvert the testimony of Daryl Vance and Billy Hale, the service manager for American, that at the time of the delivery of the Sweeper to Hales, it was in good operating condition and had no "blow-by" and that upon return it had oil in the air filter, "blow-by" and numerous other mechanical problems itemized in the Receiving Memo.

No expert evidence was offered by defendant in support of its claim that there was a defective design of the Sweeper. No design engineer nor any other person with knowledge of the design of this type of machinery was presented by defendant in support of its claim that

there was a defective design that caused or contributed to the damage to the Sweeper. Newell Hale testified about what he observed in the function of the machine, including that material picked up by the Sweeper would be deposited in the back of the machine near the area where the radiator, alternator, starter, battery and electrical equipment was located.

Q: When this machine had dumped the load of gravel, where would that be dumped from?

A: It would be dumped at -- this particular machine had two different ways of removing the debris. One particular way was to be able to lift the whole compartment up and dump it into a dumpster. The other way was to dump it just right behind the machine in a little pile.

Q: Otherwise the material would go to the back of the machine.

A: Yes, sir.

Q: And that's where the radiator was located?

A: That's where the radiator and the alternator, the starter and battery, and all that electrical stuff is back there, just getting infiltrated with dust. It was just sucking that dust into the motor chamber.

(Newell Hales, Tr. 113; 20-25; Tr. 114; 1-9.)

But Mr. Hales went on to admit that the air intake for the engine was located on top of the vehicle above the cab on a pre-breather air intake.

Q: Mr. Hales, you're aware that the actual air intake for air that goes into the engine is on top of the machine; is that right?

A: Yeah. It's located right here behind the cab, above the compartment to hold the material.

(Newell Hales, Tr. 114; 21-25.)

No expert or lay testimony was offered by Hales that any of the dust accumulating around the engine compartment could be sucked into the engine through any point other than the air cleaner or pre-breather located on top of the cab. More importantly, there was no expert testimony offered by defendant that there was any defective design or that the damages to the vehicle resulted from any defective design.

**D. Hales Did Not Offer Any Evidence To
Dispute The Cost of Repair.**

The undisputed evidence presented at trial was that the cost to repair the damages caused by Hales to the Sweeper totaled \$5,553.35. Mr. Billy Hale, the service manager for American, testified as follows:

Q. Mr. Hale, is that repair in your opinion, a reasonable amount for the damage done to this engine?

. . .

A: I would say the charges are reasonable.

Q. Okay. And what is the total of that charge.

A. The total of this charge is \$5,553.35.

(Billy Hale, Tr. 50; 11-13, Tr. 51; 6 & 7.)

Hales did not offer any evidence that the charges were unreasonable, were unnecessary or that the engine could have been fixed for a different amount.

The clear preponderance of the evidence was that the damage to the engine occurred while it was in the exclusive possession of Hales. Gail Shoemaker saw the dirty and clogged air filter and dust and dirt in the air intake when he inspected the Sweeper while it was in the possession of Hales on November 5, 1990. At that time, he determined that Hales had "dusted" the engine. Billy Hale, service manager for American, testified in detail as to how the air cleaner had been improperly installed and had an indentation on the underside of the air filter that was allowing dust and dirt to be drawn into the engine. Newell Hales admitted that the air filter with the indentation on it had been installed by Hales' personnel.

In order for the Trial Court to conclude that the damage to the engine was caused by a source other than Hales' failure to properly maintain and service the air cleaning system such as a defective design or prior damage to the engine, the Court would have to engage in mere speculation and conjecture. The Trial Court's findings against American are against the clear preponderance of the evidence and the Court should award American its damages in the amount of \$5,553.35.

POINT II

The Trial Court Should Have Awarded American A Reasonable Attorney's Fee.

The Trial Court ruled: "Hales is not a buyer under the lease option agreement and, therefore, neither party is bound by the provision of the agreement requiring the payment of reasonable attorney's fees." (Conclusion of Law No. 5.) The Lease with Option to Purchase

had several of the contractual terms printed on the back of the contract entitled "Additional Terms of Agreement" which included the following:

Should the buyer breach this agreement in any way, including failure to make payments as invoiced, then it is agreed that the buyer will pay a reasonable attorney's fee should seller be required to employ an attorney.

Hales did not dispute the those provisions contained on the reverse side of the agreement were part of the Lease with Option to Purchase entered into between American and Hales. Rather, Hales claimed that since Hales had not exercised the option to purchase under the agreement that it had not become a "buyer" and, therefore, Hales could not be liable to American for attorney's fees incurred in enforcing the agreement.

The use of the word "buyer" in the attorney's fees provision of the agreement did not impose a condition precedent to the award of attorney's fees but was merely a term used to identify the respective parties to the contract.

Ordinarily "[w]ords used in a contract will be given their ordinary, plain or natural meaning when nothing appears to show they were used in a different sense . . . and where no unreasonable or absurd consequences will result from doing so." See also 17A Am. *Jur 2d Contracts* §359 (1991); Commercial Bldg. Corp. v. Blair, 565 P.2d 776 (Utah 1977); First Community Traders, Inc. v. Heinold Commodities, Inc., 766 F2d 1007 (7th Cir.); Treat v. White, 181 U.S. 264. *Webster's Dictionary* defines "buyer" as one who acquires ownership,

right or title to anything by paying or agreeing to pay money. *Webster's Dictionary*, 248 2d ed. (1978). *Webster's* also defines buyer as one who negotiates without a purchase.

While it may be argued that the term "buyer" as used in the agreement between American and Hales would apply only to one who actually purchased the Sweeper, it may also refer to one who acquired a right in or negotiated for the purchase of the Sweeper, as was the case in this lease with an option to purchase. However, even when a term in a contract, considered by itself, has a plain, ordinary meaning, the term may sometimes be properly interpreted as having been used in a different sense if the context points out that in that particular instance and in order to effectuate the immediate intention of the parties, the term should be understood in some other sense. See Moran v. Prather, 90 U.S. 492; 17A Am Jur 2d *Contracts* §§337, 359 (1991).

It is not the object of the law for a court to seek by narrow and technical construction the means of invalidating a contract clearly expressive of the intentions of the parties. Metropolitan Savings Bank v. Murphy, 33 A 640. Furthermore, words which allow a more extensive or more restrictive definition should be taken in the sense which will best effectuate that which is reasonable to suppose was the real intention of the parties. Church v. Hubbart, 6 U.S. 187. Because the term "buyer" may admit a more extensive definition (i.e., one who acquires a right or negotiates about a purchase) the term "buyer" should extend to American.

The agreement between American and Hales should be interpreted according to the rules of contract interpretation. See Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991). In interpreting a contract the intentions of the parties are controlling. Id. (Citing John Call Eng'g, Inc. v. Manti City Corp., 743 P.2d 1205, 1207 (Utah 1987)). When "questions arise in the interpretation of an agreement, the first source of inquiry is within the document itself. It should be looked at in its entirety and in accordance with its purpose. All of its parts should be given effect in so far as that is possible." Home Sav. & Loan v. Aetna Casualty & Sur., 817 P.2d 341, 367 (Utah App. 1991) [Quoting Big Cottonwood Tanner D. v. Salt Lake City, 740 P.2d 1357, 1359 (Utah App. 1987)]; See also Larrabee v. Royal Dairy Products Co., 614 P.2d 160, 163 (Utah 1980).

"[T]he construction of a contract as to its operation and effect will, after all, depend less on artificial rules than on the application of good sense and sound equity to the object and spirit of the contract in the given case." 17A Am Jur 2d *Contracts* §342 (1991). In other words, it is the spirit and purpose rather than letter of the agreement which must control its construction. Id. Contracts must also be construed in light of the reasonable expectations of the parties as evidenced by the purpose and the language of the contract. Nixon & Nixon, Inc. v. John New & Assoc., Inc., 641 P.2d 144 (Utah 1982). The courts must read a contract as the average person would read it and should not give a contract a strained or forced construction. Buehner Block Co. v. UWC Assoc., 752 P.2d 892, 896 (Utah 1988); Home Sav. & Loan v. Aetna Casualty & Sur., 817 P.2d 341, 367 (Utah App. 1991).

A contract should not be so literally or technically construed so as to defeat the true meaning of the contract or frustrate its obvious design, which is to be determined from all of its provisions. *Id.* at §§336, 345. "Where it is plain that a strict and literal construction of a contract does not convey the real meaning of the parties, or renders a result different from that intended by the parties, such construction should not be entertained." *Id.* §345 (Citing Succession of Serralles v. Esbri, 200 U.S. 103. "A construction which contradicts the general purpose of the contract . . . is presumed to be unintended by the parties." L.D.S. Hospital v. Capital Life Ins. Co., 765 P.2d 857, 859 (Utah 1988) (Quoting Phil Schroeder, Inc. v. Royal Globe Ins. Co., 659 P.2d 509, 511 (Wash. 1983).

The primary rule is to determine what the parties intended by looking at the entire contract and all of its parts in relation to each other and in accordance with its purpose, giving an objective and reasonable construction to the contract as a whole and according it the weight and effect it shows the parties intended. See Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991); Sears v. Riemersma, 655 P.2d 1105, 1107-08 (Utah 1982); Larrabee v. Royal Dairy Products, Co., 614 P.2d 160, 163 (Utah 1980). "In interpreting a contract, we determine what the parties intended by examining the *entire contract* and *all of its parts in relation to each other*, giving an objective and reasonable construction to the contract *as a whole*." Sears v. Riemersma, 655 P.2d 1105, 1107-08 (Utah 1982) (Emphasis added.) See also Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990); Home Sav. & Loan v. Aetna Casualty & Sur., 817 P.2d 341, 366-67 (Utah App. 1991); G.G.A., Inc. v.

Leventis, 773 P.2d 841, 845 (Utah App. 1989); Western Sur. Co. v. Murphy, 754 P.2d 1237, 1240 (Utah App. 1988).

"[I]t is axiomatic that a contract should be interpreted so as to *harmonize all* of its provisions and *all* of its terms, which terms should be given effect if it is possible to do so." Home Sav. & Loan v. Aetna Casualty & Sur., 817 P.2d 341, 367 (Utah App. 1991) (Quoting L.D.S. Hospital v. Capital Life Ins. Co., 765 P.2d 857, 858 (Utah 1988). (Emphasis added.)

When taken in context, any reasonable interpretation of the agreement as a whole would indicate that the use of "buyer" is merely a means of identifying Hales in accordance with the agreement - even though the agreement did not actually require Hales to purchase the Sweeper. The terms of the agreement state: "Should the buyer breach this agreement in any way, *including failure to make payments as invoiced*, then it is agreed that the buyer will pay a reasonable attorney's fee should seller be required to employ an attorney." (Emphasis added.) Because the contract provided that if Hales were to purchase the Sweeper it would pay the full purchase price, failure to make payments as invoiced could only apply to the lease payments or other obligations such as repair costs during the lease. Therefore, a reasonable interpretation of the contract harmonizing all of its terms would indicate that buyer could only apply to Hales while it is a lessee.

Taking the contract as a whole, it appears that the Trial Court's interpretation of the contract language is strained and cannot stand. It is simply inconsistent with the agreement taken as a whole and produces an unjust result. It strains reason to conclude that the parties did

not intend that Hales would be responsible to pay a reasonable attorney's fees should American be required to employ an attorney unless it exercised the option to purchase. If the option were exercised and Hales purchased the Sweeper, Hales would have no ongoing obligations to American that could be breached to trigger the attorney's fee provision. The attorney's fee provision in the agreement could never become effective.

The testimony of Robert L. Jeffs as to the reasonable attorney's fees incurred through trial of this matter was undisputed by Hales. Robert L. Jeffs testified as to the nature of the work he performed, his hourly billing rate and the amount of hours expended. The factors Mr. Jeffs took into consideration in determining whether the attorney's fees were reasonable included his experience as an attorney, the work performed, the nature of the work, the complexity of the issues and his hourly billing rate. The uncontroverted testimony was that attorney's fees incurred through trial of this matter were \$2,685.50. Robert L. Jeffs, Tr. 101; 18-25; Tr. 102; 1-25; Tr. 103; 1-25; Tr. 104; 1-10.

Because the term "buyer" may fairly be construed on its face to apply to Hales and because the contract language due to its construction is not capable of more than one reasonable interpretation, the Court should conclude that "buyer" as used in the agreement between American and Hales applies to Hales and, therefore, requires Hales to pay the reasonable attorney's fees incurred by American in the amount of \$2,685.50 together with attorney's fees incurred in the appeal.

CONCLUSION

American respectfully requests the Court to reverse the Trial Court's Judgment of Dismissal and enter judgment for American for \$5,553.35 for the damages to the engine of the Sweeper and attorney's fees in the amount of \$2,685.00. The Court should remand the matter to the Trial Court for a determination of attorney's fees incurred in pursuing this appeal.

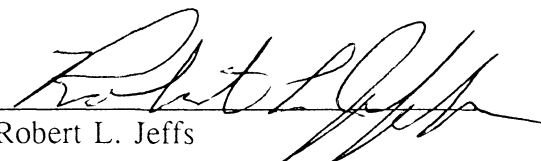
Respectfully submitted this 9th day of September, 1992.


Robert L. Jeffs

CERTIFICATE OF HAND DELIVERY AND MAILING

I hereby certify that the original and seven copies of the Brief of Appellant were hand delivered to the Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies delivered to the below named parties by placing same in the United States mails, postage prepaid, this 9th day of September, 1992, addressed as follows:

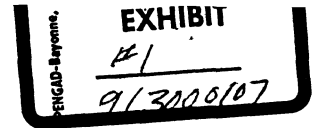
David Nuffer, Esq.
SNOW, NUFFER, ENGSTROM & DRAKE
90 East 200 North
P. O. Box 400
St. George, Utah 84771-0400


Robert L. Jeffs

APPENDIX A



PROPOSAL AND AGREEMENT



AMERICAN EQUIPMENT CO., INC.

5915 So. Industrial Rd.
Las Vegas, NV 89118
(702) 736-4919

NV Watts (800) 821-6532

1705 Marietta Way
Sparks, NV 89431
(702) 331-3855

Hales Sand & Gravel
Attn: Newell Hales

Subject: Lease with Option to Purchase One Athey AM316 demonstrator.

We are pleased to quote this sweeper for lease with option to purchase, equipped as follows:

ATHEY AM316

- 96.9 CID Volkswagen diesel engine, water cooled
- Hydrostatic Drive to Rear Wheels
- 71 inch sweeping/pickup path
- 2 cubic yard hopper capacity
- Hopper dumps onto ground or into containers up to 50 inches high
- Pressurized Water System for dust control
- Front Hydraulic Controlled Wander Broom
- Fully Enclosed Cab with Safety Glass
- Cab heater
- Buddy seat
- Rotating Beacon
- Reverse Signal Horn
- All standard features

Purchase Price.....\$35,428.00

Lease Rate per month..... 2,400.00

LEASE PLAN

1. Minimum 3 months
2. Unit must be insured while in your possession and American Equipment Co. Inc. named as loss-payee
3. 100% of payments would apply toward purchase price, less interest based on 3% over Prime, floating
4. Purchase Option may be exercised at anytime during lease term
5. Equipment must be maintained in good condition and regularly scheduled maintenance performed while in your possession
6. Prices do not include sales tax or use tax
7. All units are quoted subject to prior sale

F.O.B. _____ Shipment (approx.) _____ after receipt of order

Terms _____ Quotation firm until _____

This quote subject to terms and conditions listed on reverse side

AMERICAN EQUIPMENT CO., INC.

ACCEPTED FOR

BY

Newell Hales

Additional Terms of Agreement

It is further stipulated and agreed that all material and workmanship shall comply with the foregoing specifications noted on the reverse side hereof

It is agreed that the foregoing list and description of work to be done and materials to be furnished is complete in every detail and that there are no agreements or understandings outside thereof

A reasonable doubt as to the buyer's financial responsibility shall entitle the seller to rescind this agreement, decline shipment, or stop any materials in transit without liability until the buyer pays for the material and any indebtedness owing to seller for the work performed to that date or satisfied the seller of his financial responsibility

It is further agreed that if the buyer should become insolvent or file a petition in bankruptcy and a receiver or trustee for the benefit of creditors or stockholders or a trustee in bankruptcy should be appointed then in such case the seller shall have the right without liability to cancel any unfilled portion of this agreement and amount expended by seller immediately becomes due and payable

This proposal unless otherwise stipulated above is for immediate acceptance. Should the buyer breach this agreement in any way including failure to make payments as invoiced then it is agreed that the buyer will pay a reasonable attorney's fee should seller be required to employ an attorney

It is expressly agreed that there are no promises, agreements or understandings outside of this contract and any subsequent cancellations or modifications must be mutually agreed upon in writing

Strikes or other contingencies beyond the control of the seller, his sub contractor or his suppliers shall be sufficient justification for delay in delivery

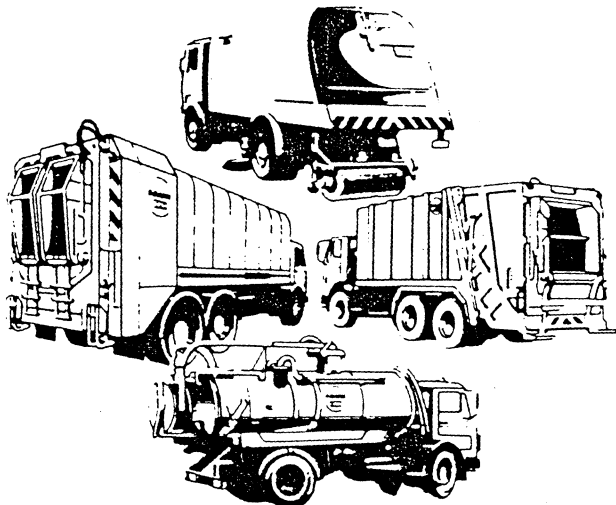
Any tax imposed by any present or future law on the sale or use of articles covered hereby shall be added to the amount to be paid hereunder. Rulings of the authorities in charge of the administration of such law that a tax is hereby imposed on such sale or use shall be final and binding on the buyer

Richfield

52A 7434

→ 527 4646

APPENDIX B



KOMMUNALFAHRZEUGE

MUNICIPAL VEHICLES

VEHICULES MUNICIPAUX - VEHICULOS COMUNALES

برنامه تولید خودرو برای کارهای شهرداری

BEDIENUNGSANLEITUNG

OPERATING INSTRUCTIONS · MANUEL D'ENTRETIEN
MANUAL DE ENTRETENIMIENTO
ارشادات التشغيل

P R E A M B L E

This operator's manual is primarily meant for the operator. He should make himself thoroughly acquainted with the rules in order to recognize and avoid possible dangers for men and machine.

During operation of the unit the operator's manual should always be at his disposal!

Operation of the machine, its maintenance and service should only be performed by qualified personnel.

We are always ready to assist in specialized training for each specific machine. Please address your inquiries to our service departments of the respective manufacturing plants, subsidiaries, agents or service workshops, whose addresses you can find in the little brochure "FAUN Service and Sales Organization".

Service work to be carried out at regular intervals is specified in the Inspection Booklet supplied with the vehicle. Please keep this booklet together with the Operation Manuel in a safe place; it is important for supervising the regular servicing and maintenance work.

In order that the operator can cope with the requirements, it is absolutely inevitable that he

- makes sure that the unit is always in a reliable and operationally safe condition,
- refuses any jobs demanded from him that are not coinciding with the rules,
- reports any special occurrences to his superior, who should decide on any further measures to be taken,
- refuses unauthorized personnel access to his machine and its working-area,
- abstains from unauthorized operations, such as for example side towing or dragging of loads, performing maintenance work under a tilted and not secured dump body, working under lifted loads, such as containers etc.,
- once he recognizes dangers for men and machine, undertakes all suitable measures to prevent such dangers.

Furthermore we should like to draw your attention to the rules and regulations for prevention of accidents as contained in the "Unfallverhütungsvorschriften der Berufsgenossenschaften" as well as in the Road and Traffic Regulations of the Federal Republic of GERMANY and similar rules or regulations pertaining to safety applicable in the country where the machine is operated.

1. Drive Unit

1.1 Engine

Comply with the manufacturer's instructions in every respect.

CAUTION! THE RADIATOR IS TO BE CLEANED ONCE A WEEK - HOWEVER, DAILY CLEANING IS NECESSARY IN CASE OF HEAVY DUSTING.

THE ENGINE-GEARED BELT IS TO BE EXAMINED ON CONTAMINATION, ABRASION AND TENSION - GENERALLY ONCE A WEEK - HOWEVER, DAILY IN CASE OF HEAVY DUSTING.

(SEE MANUAL AND SERVICE-PLAN OF PRODUCER)

CLEANING OF GEARED BELTS AND WHEELS HAS TO GO WITH IT.

1.2 Air-cleaning System

If there is a lot of dust, the filter in the air-cleaner must be cleaned daily in accordance with VW operating instructions.

The suction hose and its connections for the combustion air should be checked for leaks or cracks once a week.

1.3 Injection Pump

The injection pump is set and sealed to a maximum engine speed of 2.300 rpm. Defective injection pumps may be replaced and set only by qualified experts. When the set screw has been adjusted it should always be sealed.

CAUTION! IF THE SEAL IS DAMAGED OR REMOVED, THE LICENSE TO OPERATE THE VEHICLE BECOMES NULL AND VOID. MOREOVER, WE RESERVE THE RIGHT TO REJECT ANY GUARANTEE CLAIMS.

1.4 Wheel Drive Motors

The oil in the mechanical part of the wheel motors should be checked every 250 hours of operation (Fig. 3/1).

The first oil-change should take place after the first 40 hours of operation, thereafter every 750 hours but at least once a year. To do this, park the vehicle in a horizontal position. Clean and open locking screw (Fig. 3/1) carefully; drain the oil. Turn the wheel so that the word "OIL" and the marking are horizontal. Fill with oil until it overflows at the locking screw. If after a few minutes the oil level has dropped, fill up again with oil until the correct level is obtained and remains constant. Replace and tighten the locking screw.

Type of oil: 0,6 litres of SAE 90 MIL-L 2105 B for each wheel motor.

D) MAINTENANCE AND SERVICING

LUBRICATION AND SERVICING PLAN

EXPLANATION OF SYMBOLS:



Check



Spindle oil


Multi-purpose grease
(Shell-Alvania R 2)

		Depending on hours of operation	Symbol	Page
1.	Maintenance and servicing of the engine in accordance with the manufacturer's instruct.		○	20
1.1	Clean cooler Engine-geared belt to be examined on abrasion and tension and then to be cleaned	Once a week, every day if very dirty	○	20
1.2	Clean air-cleaner, replace if necessary	Every day	○	20
1.4	Wheel drive motor - oil change (see Operating Instructions)	For the first time after 40, there- after every 750 at least once a year	0,6 li- tres of SAE 90 for each wheel motor	20 - 21
	Wheel drive motor - oil-level check	Every 250	○	20
1.5	Grease kingpin - front wheel	Once a week	■	21
	Front wheel bearings - renew grease	Once a year	■	21
	Check tyre pressure: 4,9 bar	Once a week	○	21
	Check wheel fastening nuts and bolts for tightness (see Operating Instructions)	For the first time after 50 km, thereafter every 200 km	○	21
1.6	Check brake fluid level	Once a week	○	21
	Check brake linings for wear and tear	Depending on opera- ting conditions	○	21
1.7	Check steering for good work- ing order	Every 250	○	22

APPENDIX C



AMERICAN EQUIPMENT CO., INC.

5915 Industrial Rd
Las Vegas, NV 89118
(702) 736-4919

1705 Marietta Way
Sparks, NV 89431
(702) 331-3855
NV Watts (800) 821-6532

December 6, 1990

Hales Sand And Gravel, Inc.
Box 279
Redmond, UT 04652

Attention: Mr. Newell Hales

Subject: Athey Model AM-316 Sweeper, Serial No. WFN2ARIV2G-9000109

Dear Mr. Hales:

On or about November 5, 1990, we received a phone call from your office indicating you were having difficulty starting subject sweeper. We dispatched our serviceman to repair same on November 6, 1990. He returned on November 10, 1990, and replaced the starter. The serviceman reported that the air cleaner was excessively dirty and had not been changed and was allowing dirt to by-pass the filter and enter into the engine. In addition, he advised excessive blow by on engine breather. He also indicated that the engine appears to have low compression. Serviceman indicated that cold weather existed and possibly the water system was not being utilized for dust control.

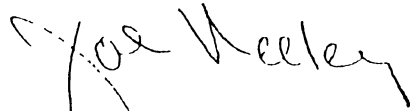
The sweeper was returned on November 20, 1990, and was inspected here in Las Vegas. Our inspection revealed the following problems:

Tachometer inoperative, lower right mirror broken, water line of wander broom damaged, engine misses at high idle and smokes at low idle, engine low on power, air filter very dirty and oil in filter housing from blow by, the forward/reverse lever was removed and threads damaged.

The sweeper was delivered to the local authorized Volkswagen Engine Dealer (Gaudin Import). Gaudin Import ran a compression test on the engine. We were advised that the engine compression normal per cylinder is 400 PSI. The actual compression on cylinders of subject engine ranged between 200 and 265 PSI. As a result of this report, we authorized Gaudin to disassemble the engine to evaluate and submit a quotation to repair same. Gaudin later advised that excessive dirt had entered the engine and that they quoted \$3,050.00 to repair same.



Our service department invoiced Hales Sand And Gravel, Inc. the sum of \$5,553.35 to cover engine repair and earlier efforts by our serviceman. This is obviously a serious situation and I respectfully request that you phone me at your earliest convenience to discuss.

A handwritten signature in cursive script, reading "Joe Neeley". The signature is written in dark ink and is positioned above the printed name.

Joseph J. Neeley
President
American Equipment Co., Inc.

JJN:dw

cc: Billy Hale, Service Manager
Vicki Campbell, Office Manager

APPENDIX D

AMERICAN EQUIPMENT CO., INC.

Reno, Nevada
(702) 331-3855

11171 So. Cherry Ave.
Fontana, CA 92335
(714) 829-0447

5915 So. Industrial Rd.
Las Vegas, NV 89118
(702) 736-2401

RECEIVING MEMO

Received from: HALES SAND & GRAVEL Date Received 11-20-90

Address: _____ City _____ State _____

Carrier _____

MACHINE: _____	ENGINE: _____	FUEL PUMP: _____
New _____ Used <u>X</u>	Make _____	Make _____
Make <u>ATNEY</u>	Model _____	Model _____
Model <u>AM316</u>	Spec # _____	Part # _____
Serial # <u>WFN2AK1V2G</u>	Engine # _____	Serial # _____
<u>9000109</u>		
TRANSMISSION: _____	CONVERTER: _____	ATTACHMENTS: _____
Make _____	Make _____	Bucket P/N _____
Model _____	Model _____	Tooth P/N _____
Part # _____	Part # _____	Blade Serial # _____
Serial # _____	Serial # _____	Scraper Serial # _____

Other Attachments: RETURNED 3 NEW GUTTER BROOMS

HOURLY METER READING 383 RENTAL _____ DEMO _____ TO STOCK _____
Fuel 1/2 1340 MILES

REMARKS: (Shortages, repairs needed etc.) TACHOMETER INOPERATIVE. LOWER RIGHT MIRROR BROKEN. WATER LINE OF WANDER BROOM DAMAGED. FORWARD REVERSE LEVER REMOVED & THREADS DAMAGED. ENGINE HAS MISS AT HIGH IDLE & SMOKES AT LOW IDLE. ENGINE LOW ON POWER. AIR FILTER VERY DIRTY & OIL IN FILTER HOUSING FROM BLOW BY.

Harold Vance

